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B.A.M. Development, A Utah limited liability company v. Salt Lake County, a body corporate and politic of the State of Utah : Amicus Curiae Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

B.A.M. DEVELOPMENT, L.L.C, A Utah limited liability company, Respondent and Cross-Petitioner, - vs.- SALT LAKE COUNTY, a body corporate and politic of the State of Utah, Petitioner and Cross-Respondent.	Supreme Court No. 20040365-SC (20010840CA)

AMICUS CURIAE BRIEF OF THE UTAH STATE PROPERTY RIGHTS OMBUDSMAN IN SUPPORT OF THE POSITION OF THE CROSS-PETITIONER BAM DEVELOPMENT, LLC

ON WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

BASIS FOR PARTICIPATION BY AMICUS CURIAE 1

ISSUE PRESENTED FOR REVIEW 1

SUMMARY OF ARGUMENT 2

STANDARD OF REVIEW 4

STATEMENT OF THE CASE 5

ARGUMENT

1. The imposition of exactions are, of necessity, administrative matters 6

2. An additional record is not required in this matter. 9

   (A) There is clear legal precedent related to the record required in administrative land use decisions. 11

   (B) The BAM opinion by the Court of Appeals confuses clear precedent about land use appeals on the record. 13

   (C) The confusion over the record should be cured. 16

3. The result of the Bam opinion is excessive cost, delay and hassle for citizens. 19

CONCLUSION 21

TABLE OF AUTHORITIES

FEDERAL CASES

Dolan v. City of Tigard, 512 U.S. 374 (1994). 1-9

Euclid v. Ambler Realty, 272 U.S. 365 (1926) 9

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987). 1

Penn. Coal v. Mahon, 260 U.S. 363 (1922). 21

San Diego Gas and Electric v. City of San Diego, 450 U.S. 621 (1981) 15

STATE CASES

Banberry Development Corp. v. South Jordan City, 631 P.2d 899 (Utah, 1981) 4

Bradley v. Payson City, 2003 UT 16. 12

Davis County v. Clearfield City, 756 P.2d 704 (1988) 10

Patterson v. Utah County Bd. of Adj., 893 P.2d 602 (Utah Ct. App 1995) 11

Ralph L. Wadsworth Const. Co. v. West Jordan City, 2000 UT App 49. 11

Wells v. Bd. of Adjustment of Salt Lake City, 936 P.2d 1102 (Utah Ct. App. 1997). 10

Xanthos v. Bd. of Adjustment of Salt Lake City, 685 P.2d 1032 (Utah 1984) 10

STATE STATUTES

Utah Code Ann. § 10-9-1001 17

Utah Code Ann. § 17-27-1001 10

Utah Code Ann. § 63-34-13 17

Utah Code Ann. § 63-90a-4 . . . . . 1, 11

BASIS FOR PARTICIPATION BY AMICUS CURIAE

Rule 25 of the Utah Rules of Appellate Procedure permits the filing of an amicus brief by leave of the court in response to a motion by an applicant-amicus curiae. A motion by the Utah State Property Rights Ombudsman (the ombudsman) was filed by mailing it to the court concurrently with the mailing of this amicus brief by first class mail on December 20, 2004. This brief has accordingly been filed within the extended time allowed for the filing of the brief of the Cross-Petitioner, whose position this amicus brief supports.

The opinions, conclusions, and arguments stated in this brief are those of the Amicus alone and are not official positions of the State of Utah or of the Attorney General or the Department of Natural Resources of the State of Utah.

ISSUES PRESENTED FOR REVIEW

By order of the Court dated August 5, 2004, the Utah Supreme Court granted review by certiorari in this matter limited to the following issues:

(1) Whether the *Nollan/Dolan* (*Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841-842 (1987) and *Dolan v. City of Tigard*, 274, 377 (sic) (1994) "rough proportionality" test applies where an alleged taking results from a uniform legislative land-use scheme rather than an ad hoc site-specific adjudicative decision;

(2) whether the court of appeals erred in holding the district court's review was

limited to the administrative record; and

(3) whether Section 63-90a-4 of the Utah Code permits review regardless of the state of the administrative record.

SUMMARY OF ARGUMENT

The Amicus appears in this matter primarily to argue that the remedy imposed by the Court of Appeals was inappropriate and that the precedent set in the opinion rendered will work great hardship on average citizens who attempt to challenge the imposition of unfair and extreme exactions and conditions on development. In order to reach this issue, however, the Amicus must first address the first issue in this matter and support his conclusion that the imposition of exactions in this matter is not a legislative decision, but an administrative decision.

Issue (1): There are few issues that are as clear in takings jurisprudence as the heightened degree of scrutiny afforded when governmental action results in physical occupancy of private property and/or the interference with the protected property right to prohibit the physical entry upon private property by others.

The specific land dedication requirement discussed in the *Dolan* case, and which the U.S. Supreme Court declared to be an illegal exaction, was itself a legislative mandate imposed administratively on Ms. Dolan in the process of her application for a land use approval.

Precedents cited by the Petitioner (hereinafter referred to as "the County") in its opening brief are inapposite here. They are cases involving the imposition of a general

scheme of fees or regulations on development that are similar to general applications of local government police power. None of those cases involve the forced physical occupation of private property as a condition of development. None involved a matter of heightened scrutiny of favored property rights. The clear holding in *Dolan* is that such matters are always administrative and always subject to a duty that the governmental entity imposing exactions must do so with an "individualized determination" that the balance of burdens on both sides of the analysis is "roughly proportional".

Issue (2): This case is about an administrative decision to impose exactions on a development approval - a land use decision. This Court has previously held in unequivocal language that administrative land use decisions are reviewed as record appeals and that local land use decisions will be overturned if not supported by substantial evidence on the record. There is no need to remand this matter again to create a record, since the planning staff, the planning commission and the county commission conducted a total of four processes, deliberated four times and made four separate decisions to impose the exactions in the normal land use process where there was ample opportunity for the County to meet its burden to establish the record that the *Nollan/Dolan/Banberry*[1] precedents require: an individualized determination that the exactions imposed meet the *Nollan/Dolan/Banberry* standards of essential nexus, rough proportionality, and fairness.

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[1]While the Court of Appeals cited *Nollan* and *Dolan* as the basis for its discussion of exactions, this Court has also held that development exactions must be fair and equitable, and that the government entity involved has a burden to do the calculations, notably in the case of *Banberry Development Corp. v. South Jordan City*, 631 P.2d 899, 904-05 (Utah, 1981).

If the governmental entity fails to do so, and thus if the record does not contain substantial evidence to support those required findings, then just as this Court and the Court of Appeals have held on a number of previous occasions in dealing with other administrative law and land use issues, the action of the governmental entity is to simply be overturned. The property owner has no duty to go back and attempt again to persuade the government entity to establish a record, just as he or she would not be required to attempt again to establish a record in challenging any of the other non-legislative land use decisions that this Court has reviewed on the record.

Issue (3): The Amicus makes no argument related to the third issue before this Court.

STANDARD OF REVIEW

The County inaccurately states the standard of review by characterizing the claim of the Cross Petitioner (hereinafter referred to as "BAM") as a facial challenge to a legislative act. It is not. BAM has challenged the ad hoc application of a legislative scheme to a specific land use approval. This review is on the record as it is with any administrative land use decision. The proper standard of review is therefore that the County's actions in requiring the dedication and improvement of real property in order to obtain an administrative land use approval must be declared to be illegal if those actions are not supported by "substantial evidence on the record" as that record is established during the normal local land use decision process. (See discussion below).

STATEMENT OF THE CASE

This matter involves a claim that BAM, as a property owner, was the subject of inverse condemnation by the County. BAM claimed that various exactions were imposed on it as a condition of the County's approval of a subdivision plat, and that the exactions were unconstitutionally imposed without the payment of just compensation.

The panel of judges that heard the matter in the Court of Appeals unanimously agreed about the characterization of the law related to exactions and conditions on development and the proper standards of review of both legislative and administrative decisions by local government officials with regard to such exactions.

> In Dolan, the Court concluded that for a development exaction to be constitutional, the government must show an "'essential nexus'. . . between the 'legitimate state interest'" and the land dedication requirement. . . . The Court further explained that to succeed the government "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.". . . . The Court labeled this examination a "rough proportionality" test.

BAM Opinion at ¶ 15. The Court of Appeals then determined that since no such determination was provided in a record produced by some appeals process, it would order that the matter be remanded back to the District Court, which would determine what entity at the County would conduct an appeal. At that appeal, the county officials who hear the appeal should decide if there has been or can be an individualized determination made that the exactions imposed on BAM are related both in nature and extent to the impact of BAM's development.

From that decision the County has requested certiorari from this Court, claiming

that this was not an administrative matter at all, but a legislative issue. The County claims that ordinance-based development exactions are not subject to *Dolan*-style scrutiny. BAM also requested that this Court hear the matter, claiming that the Court of Appeals should not have remanded the matter back to the district court, but should have entered a decision on the merits of the case such as was suggested by Judge Orme's dissenting opinion.

The Amicus supports the opinion of Cross-Petitioner BAM in this matter for the reasons stated below.

ARGUMENT 1

The Imposition of Development Exactions are, of Necessity, Administrative Matters.

This citation from the *BAM* opinion above duplicates the text of the *Dolan* decision, where the U.S. Supreme Court wrote:

> No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

Dolan at 391 (emphasis added). This specific statement in and of itself defeats any claim that exactions can be imposed by legislative fiat. An "individualized determination" of "the" required dedication cannot be made in an ordinance. In its opening brief, the County claims that issues related to development exactions under its legislative roads plan should be treated with the deferential review that this Court and others have afforded legislative exercise of the police power. The *Dolan* Court discussed

this issue as well and dismissed such arguments:

> JUSTICE STEVENS' dissent relies upon a law review article for the proposition that the city's conditional demands for part of petitioner's property are "a species of business regulation that heretofore warranted a strong presumption of constitutional validity." . . . But simply denominating a governmental measure as a "business regulation" does not immunize it from constitutional challenge on the grounds that it violates a provision of the Bill of Rights. In *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307 (1978), we held that a statute authorizing a warrantless search of business premises in order to detect OSHA violations violated the Fourth Amendment. (Citations omitted) And in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of N.Y.*, 447 U. S. 557 (1980), we held that an order of the New York Public Service Commission, designed to cut down the use of electricity because of a fuel shortage, violated the First Amendment insofar as it prohibited advertising by a utility company to promote the use of electricity. *We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.*
>
> *Dolan* at 392 (Emphasis added). Thus the *Dolan* opinion clearly states that

constitutional rights, whether property rights or other rights enumerated in the Constitution, cannot be swept aside by legislative schemes such as those listed in this excerpt from *Dolan*. The Court then specifically rejects a minimal level of scrutiny such the "reasonably debatable" standard that the County wishes this Court to adopt by painting the issue here as purely a legislative matter. *Dolan* instead imposes a heightened standard of review:

> We think the "reasonable relationship" test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment.

Dolan at 391. Legislatively adopted ordinances, standards and rules can certainly set the stage for the imposition of exactions. But they must contain language providing for an administrative process that results in an individualized determination that the exactions are imposed in a manner that is roughly proportionate.

It is important to note that the specific land dedication requirement discussed in the *Dolan* case, and which the U.S. Supreme Court declared to be an illegal exaction, was itself a legislative mandate imposed administratively on Ms. Dolan in the process of her application for a land use approval.

> After the completion of a transportation study that identified congestion in the Central Business District as a particular problem, the city adopted a plan for a pedestrian/bicycle pathway intended to encourage alternatives to automobile transportation for short trips. The CDC requires that new development facilitate this plan by dedicating land for pedestrian pathways where provided for in the pedestrian/bicycle pathway plan.

Dolan at 375. In *Dolan* the point was made that an exaction, even when legislatively imposed, is not going to be reviewed under a deferential standard as was the general zoning scheme described in *Euclid v. Ambler Realty,* 272 U.S. 374 (1926). Although the *Dolan* exactions arose from a city-wide pedestrian/bicycle pathway plan, the Court did not include the *Dolan* issue in the same genre as *Euclid* even though both of these matters arose from land use regulations and both originated in legislative enactments. The *Dolan* Court also noted in footnote 8 of its opinion that the City of Tigard had "made an adjudicative decision to condition (Ms. Dolan's) application for a building permit." Since the context of the *Dolan* case and the *BAM* case are almost

identical, we can assume that the imposition of exactions on BAM, even if they are legislatively mandated, was accomplished in an administrative or adjudicative process.

Precedents cited by the County in its opening brief which hold that the imposition by legislation of fees and police power regulations on development is not subject to the *Nollan/Dolan* analysis are inapposite here. They are cases involving the imposition of a general scheme of fees or regulations on development that are similar to general applications of local government police power. None of those cases involve the forced physical occupation of private property as a condition of development. None involved a matter of heightened scrutiny of favored property rights.[2]

ARGUMENT 2

An Additional Record is Not Required in this Matter

The disagreement among the panel hearing this matter at the Court of Appeals, however, was not about the legislative/administrative deference issue. The entire panel held that even a legislative scheme required the individualized *Dolan* analysis. The dissent of Judge Orme was written in response to the decision of the majority to remand the matter for further hearings and the establishment of a record for review.

The decision by the *BAM* majority to remand this matter has eroded the ability of citizens, land use administrators, and property owners in Utah to determine the

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[2]See BAM opinion, at ¶¶ 56-57 (Orme, dissenting) for specific citation to several prominent precedents that are on point and reflect this national consensus that "[A] municipality should not be able to insulate itself from a takings challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen's property."

appropriate method to establish a record of local land use decisions. If the Court of Appeals' decision to remand this matter for further administrative hearings is overturned and thus reconciled with prior legal precedent, there will be less confusion about how the record of a land use decision is to be created, by whom, and when.

The Court of Appeals recognized this case as an administrative matter and determined that the County had acted in violation of Utah Code Ann. §17-27-1001 by making a decision unsupported by substantial evidence in the record. That is indeed correct, but the Court of Appeals majority named the wrong land use decision as being arbitrary, capricious and illegal. In para. 5 of the opinion, the Court of Appeals held that the decision to *deny an appeal* of the takings question was arbitrary, capricious and illegal. It should have held, instead, that the decision to *impose the exactions* originally was arbitrary, capricious and illegal.

Significantly, the County in its opening brief to this Court has ceded this issue and agreed that the Court of Appeals correctly held that the district court's review of administrative land use decisions is based on the administrative record. (P. 35 of 43) and that the imposition of exactions on land use approvals is administrative in nature.

The confusion with the Court of Appeals decision comes, ironically, because the property owner sought too many reviews at the local level - not that it sought too few. The decision that the Court of Appeals held to be unsupported by substantial evidence on the record was not an essential appeal. It was simply sought by the property owner as an additional opportunity to resolve the matter locally before proceeding to court. The

opinion of the Court of Appeals in this matter has punished the property owner for seeking a remedy it was not required to seek under the law.[3] This matter was ripe and the record was closed when the County planning commission and county commission each decided twice to impose the exactions without meeting the *Nollan/Dolan/Banberry* tests. Under the clear holding of *Dolan*, as explained above, this duty to cite substantial evidence to support its decision was the County's duty, not the property owner's.

(A) There is Clear Legal Precedent Related to the Record Required in Administrative Land Use Decisions

This Court recently restated and clarified the difference between local legislative decisions and local administrative decisions. In the recent case of *Bradley v. Payson City* 2003 UT 16, this Court noted that different standards of review apply for each type of decision.

> When a municipality makes a land use decision as a function of its legislative powers, we have held that such a decision is not arbitrary and capricious so long as the grounds for the decision are "reasonably debatable." . . . When a land use decision is made as an exercise of administrative or quasi-judicial powers, however, we have held that such decisions are not arbitrary and capricious if they are supported by "substantial evidence."

Bradley at ¶10. This case falls under the administrative prong of this two-fold

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[3]For example, the legislature even created a takings appeals procedure in Utah Code Ann. §63-90a-4 and specifically declared it to be optional and unnecessary to bring a takings claim in court. While this is not the context that BAM chose to use in asking for an appeal of the exactions imposed, it does indicate that the clear intent of the legislature that such an appeal was not necessary in order to establish the record needed to appeal an administrative land use decision to the district court.

process. This Court and the Court of Appeals have consistently held that where the record lacks the substantial evidence needed to support an administrative land use decision, that decision is overturned. Where there is sufficient evidence, the decision is upheld. See e.g., *Davis County v. Clearfield City,* 756 P.2d 704 (1988) (Public clamor held to be insufficient evidence to support denial of conditional use permit, permit is ordered to be granted); *Xanthos v. Bd. of Adjustment of Salt Lake City*, 685 P.2d 1032, 1034-35 (Utah 1984) (board of adjustment's denial of a zoning variance upheld because property owner failed to meet his burden to justify the variance); *Wells v. Bd. of Adjustment of Salt Lake City Corp.*, 936 P.2d 1102, 1105 (Utah Ct. App. 1997) (board of adjustment decision granting variance overturned because specific findings not made on the record); *Patterson v. Utah County Bd. of Adjustment,* 893 P.2d 602, 604 (Utah Ct. App. 1995) (decision by board of adjustment to grant special exception is upheld because evidence supporting it was placed on the record); *Wadsworth Construction v. West Jordan City*, 2000 UT App 49 (City Council decision denying conditional use overturned because record showed the decision was based on generalized complaints of neighbors and not substantial evidence, court ordered that conditional use permit be granted.)

It is to be noted that in all these recent land use cases, the Utah appellate courts have made consistent decisions about appeals related to local administrative land use decisions. Where the decision by the municipality or county was supported by substantial evidence on the record, it was sustained. Where the record was not sufficient to support an action, the action was overturned. The person or entity whose responsibility it was to

establish the record bore the consequences of not fulfilling that function. In all of these cases, the relevant land use decision was overturned rather than remanded back for another hearing to establish a record.

(B) The BAM Opinion by the Court of Appeals Confuses

Clear Precedent About Land Use Appeals on the Record

In BAM the Court of Appeals correctly held that the process of proving that an exaction meets the *Nollan/Dolan/Banberry* test was an administrative, fact-laden process. As such, a record review is required. The Court of Appeals then held that no record existed, so one must be created by another appeals process at the County.

In coming to this conclusion the Court of Appeals inaccurately assumed that there had been no hearing on the exactions issue. There clearly had been. In the process of subdivision approval, the county engineering staff, the county planning commission and the county commission had conducted *four separate* processes of review where, under *Dolan*, they had a duty to make an individualized analysis of the basis for the exactions they imposed on BAM's application for subdivision approval, yet apparently failed to do so.

According to the County's opening brief before this Court, the decisions made by the engineering staff, the Planning Commission or the County Commission involving the proposed subdivision were as follows:

August 26, 1997, engineering staff approval with exactions;

June 23, 1998, Planning Commission imposes exactions at preliminary approval;

July 18, 1998, County Commission refuses to hold a hearing on BAM's claim that exactions are illegal;

June 23, 1999, Planning Commission again imposes exactions in final approval;

and August 18, 1999, County Commission imposes exactions in final approval process.

Note that two of these hearings were held *after* the July 18, 1998 refusal by the County Commission to hear an appeal where BAM claimed the development exactions were illegal and unconstitutional because those exactions were unsupported by findings of rough proportionality. The County had four chances to lay upon the record the individualized determination required that their exactions were roughly proportionate, two of those chances after BAM had even filed a notice of claim specifically challenging the exactions as unconstitutional. The County did not meet that duty on four separate occasions, but the Court of Appeals ordered that the County should go back and try again.

The Court of Appeals' majority opinion misses the essence of *Dolan*: That the County, not the property owner, had the burden to establish the record and to make the individualized determination, which it failed to do. In a number of previous opinions, cited above, both this Court and the Court of Appeals have consistently held that, where the local land use authority had a duty to include substantial evidence in the record and failed to do so, the action of the authority was invalid.

Is this too much of a burden on local government? This matter involves an identified civil right, protected by the Bill of Rights and the Constitution of Utah which

has been specifically given the privilege of heightened scrutiny by the U.S. Supreme Court, just as many other constitutional rights have been protected. As Chief Justice Rhenquist stated in *Dolan*: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." (*Dolan*, at 392) As Justice William Brennen observed in a noted takings case, "After all, a policeman must know the Constitution, then why not a planner?" *San Diego Gas and Electric v. City of San Diego*, 450 U.S. 621, 661 (1981) (Brennen, J., dissenting).

The *BAM* decision from the Court of Appeals apparently holds that in the narrow arena of land use law that involve inverse condemnation challenges to development exactions, where government entities have a heightened duty to make findings and support such decisions, a failure to do so is not fatal to the local government's efforts to defend its actions. Even after the property owner goes to court, his or her only remedy under *BAM* is to ask that the court force the recalcitrant government entity to hold a hearing and enter findings of rough proportionality.

Could it not seem ironic that in this one area where the U.S. Supreme Court has established guidelines that are actually clearer than any other area of regulatory takings jurisprudence, based on a heightened scrutiny and a pronounced effort by the high Court to protect significant property rights, the Court of Appeals has made the process more complicated, tedious and exhausting than any other claim brought under land use law? In the other land use cases before this Court and the Court of Appeals, the local decision was

reviewed on the record that came with the decision, not on the lack of a record related to an extraneous appeal.

(C) The Confusion Over the Record Should Be Cured

This Court should take advantage of this opportunity to clarify what is meant by the duty to justify development exactions with substantial evidence on the record and reaffirm the relatively clear precedent set before *BAM* by the Utah appellate courts in land use matters. If *BAM* is allowed to stand as decided, then a very unworkable and unfair legal precedent will have been created.

This state of affairs is of particular concern to the amicus property rights ombudsman. The office of the property rights ombudsman was created in 1997 by the Utah Legislature in an effort to assist property owners to understand the way that property is regulated and to assist local government and property owners in resolving disputes. The goal of the office is to attempt to avoid litigation and to use conciliation, mediation, and other alternative dispute resolution processes to solve problems in a manner that is fast, fair, and more friendly than the other options. The 2004 legislature expanded the definition of his duties to include all land use issues.[4]

The ombudsman receives a number of calls each year about illegal conditions on

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[4]The Property Rights Ombudsman statute is at Utah Code Ann. §63-34-13, last amended by Senate Bill 9 in the 2004 General Session of the Legislature. The amendment included changes defining the ombudsman's role as assisting with all land use disputes. See §63-34-13(4). In the Land Use Development Management Act for both municipalities and counties, the ombudsman is given the power to arrange arbitration of land use disputes involving constitutional takings issues and stay the time to file a land use appeal. See Utah Code Ann. §§ 10-9-1001 and 17-27-1001.

development. As one might expect, the context for such a call involves some concerns about cost and timing. The Ombudsman's office received complaints from 49 families and companies about illegal exactions in FY 2003. This represented approximately 25% of the land use questions brought to him.

These cases involve real families with real problems. For example, it is common that a family wants to divide land into two parcels to build a second home on what was originally one oversized parcel so that two or more generations can live closer. Because this is a subdivision of land, such a request sometimes triggers all the processes and responses that the subdivision ordinance usually imposes on larger scale development by full-time real estate professionals. Sometimes this results in the imposition of extraordinary burdens, particularly in situations where, as the County has described in the instant case, local officials feel they have no discretion to depart from rigid, legislatively imposed rules. Recent cases have involved:

- excessive street dedications of more than twice the width of a typical single family residential street without any showing that one house would create the need for an arterial highway;
- paying to bury large regional power lines without any showing that adding one more household created the need to do so;
- building bike paths for public use and thus interfering with the protected right to exclude others from private land;
- digging up and replacing canal systems in the existing public right of way

where those canals are not even publicly owned and do not provide irrigation water to the land to be subdivided;

- demanding "slope easements" to allow embankments to be built on private property in the future to support arterial streets much wider than a single family residential use justifies;
- dedication of creekside and hillside lands for public open space and trails in greatly disproportionate quantities when compared with the open space demanded of typical suburban development; and
- demanding that the applicant for a second home on a rural farm agree to participate in significant costs of future street systems to serve adjoining lands when those neighboring lands develop into full-blown suburban sprawl. These future streets are completely unrelated to the need to access the individual second home that is the subject of the approval sought.

All of these exactions are real world examples where local governments in Utah attempted to impose exactions in response to a single property owner's request to divide off a parcel of land so another family member could build a home on what was originally an oversized lot or agricultural acreage. None required a zone change. None added any more density than one additional residence near an existing older family home.

If, under BAM, the local government entity involved in one of these cases refused to provide substantial evidence on the record to support these exactions, or to otherwise agree to rescind the exactions, the property owner involved would have to go to the

district court and get an order directing the local decision makers to create a record of their refusal. This is not correct or fair and it eliminates the statutory ability of the property owner to avoid litigation if he or she would prefer to mediate disputes through the ombudsman.

The imposition of exactions in the land use process, by the precedent established by the U.S. Supreme Court, the Utah Supreme Court, and the Utah Court of Appeals, is subject to a burden imposed by *Nollan, Dolan,* and *Banberry* that findings of nexus, rough proportionality, and fairness be met by the government entity imposing the exactions. When that duty is not met, the imposition of the exactions should be of necessity invalid, just as a variance would be invalid if unsupported by substantial evidence and the denial of a conditional use permit is invalid if substantial evidence is not provided that supports that denial.

ARGUMENT 3

The Result of BAM is Excessive Cost, Delay and Hassle for Citizens

BAM involves a landowner with a significant commercial interest in development. It is no doubt daunting for small municipalities to attempt to cope with all of the pressures and difficulties involved in managing local land use for the benefit of all of the citizens and to cope with the sometimes vast resources of large developers or multinational corporations. However, those involved professionally in the real estate industry have learned to understand the necessary give and take that must be undertaken if one is to

succeed in a competitive, market-driven business. The Amicus filing this brief is not doing so to join forces with big developers and gang up on small municipalities.

The office of the property rights ombudsman was created to serve another group entirely. They are home owners, small farmers, neighbors of proposed development, independent business people and passive investors. The laws must, of course, apply equally to them, even when those laws approach the unfathomable.

These people are particularly vulnerable to local land use decisions that are arbitrary, capricious, and illegal. This is not to say that local land use professionals consistently abuse discretion, violate due process, engage in extra-curricular enforcement of the law while ignoring the ordinances. The ombudsman's experience is just the opposite. Most of the time he explains to those who call that local officials are just doing their jobs within the discretion that the courts and legislature have given them. If this were not so, a one-person ombudsman office could hardly cope with the avalanche of land use complaints that would flow to it.

But when hundreds of local government entities delegate to thousands of decision makers the hundreds of thousands of transactions that are processed annually, there are always a number of occasions where, as Justice Oliver Wendell Holmes stated it, regulation goes "too far." (*Penn. Coal v. Mahon*, 260 U.S. 363 (1922). When that occurs, there ought to be a fast, fair, friendly way to resolve the concerns and to move on with relationships intact.

The *BAM* decision works against the opportunity for the ombudsman to assist

property owners in resolving a common variety of land use disputes. Where we find those few local officials with the inclination to impose undue burdens as exactions and to inappropriately abuse discretion, *BAM* imposes on citizens who attempt to defend protected Constitutional rights another layer of obstacles and appeals that did not exist before. Obstacles that are simply beyond the ability of an individual homeowner or small businessperson to cope with. For those who cannot afford to seek a court order requiring the local government to enter findings, the fight to protect rights that were supposedly given special status by *Dolan* is over before it even begins.

It would be easy to see how it happens that often the property owner simply caves in because the cost of fighting the exaction is more than the value of the land or improvements demanded.

CONCLUSION

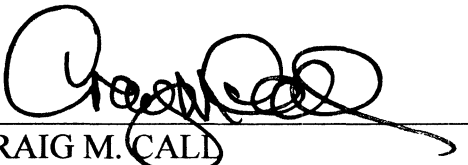
The *BAM* Court correctly held that the review of exactions imposed, even when authorized by a legislative scheme, is an administrative process and that judicial review of that process must be made on the record. Government entities under *Dolan* have an affirmative duty to make an individualized determination that exactions imposed are roughly proportionate. Exactions must therefore be supported by substantial evidence if they are to be upheld.

The result of the *BAM* Court's remand, however, is that citizens have few viable options to challenge a practice that is too common in local land use administration. After BAM there is no effective appeals procedure available when the local government

decides to stonewall the complaints of property owners. The ombudsman's opportunity to assist small property owners has been greatly reduced by the Court of Appeals' holding in this matter.

By restating the principles outlined above that this Court has long embraced, it could restore a degree of certainty and finality that would otherwise be lost to citizens attempting to use property in a manner that is legal, appropriate, and unencumbered by excessive regulation and exactions. As it has held repeatedly, this Court should restate the simple rule for administrative appeals: If the local government entity has not supported its exactions with substantial evidence on the record, the decision to impose those exactions will be deemed invalid and there will be no duty by the property owner to comply with them. There is no need for a remand to the District Court so that it can order the County to conduct another hearing in this matter and establish a record for review.

Dated this Twentieth day of December, 2004



CRAIG M. CALL
Property Rights Ombudsman
Utah Department of Natural Resources
Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of December, 2004, I caused two (2) copies of the a true and correct copy of the **AMICUS CURIAE BRIEF IN SUPPORT OF THE CROSS PETITIONER BAM DEVELOPMENT** to be mailed, first class, postage prepaid:

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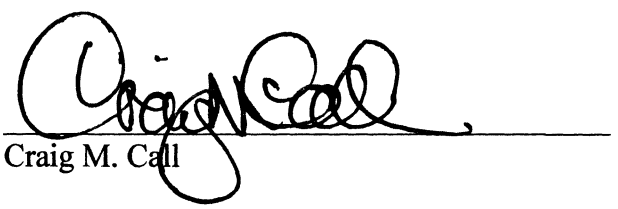

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